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From:

Sent: Friday, January 08, 2010 3:35:31 PM

To:

Cc:

Subject: Section 6652(j)

This e-mail responds to your question on 1/4/10 regarding the application of section 6652(j) as cross referenced in section 142(d)(7). has jurisdiction over the low-income housing credit under section 42. Section 42(l)(3) cross references section 6652(j) for the failure to submit the report required under section 42(l)(3). In PTMA 01967, concluded that a failure by a state housing agency to file a complete report as required by section 42(l)(3) results in a \$100 fine. Your question relates to whether PTMA 01967 correctly interpreted section 6652(j) in light of the language in the Joint Committee Print in the "General Explanation of the Tax Reform Act of 1986," JCS-10-87, which states that a separate failure to comply occurs each day after the due date that a report is not filed. forward the question to , which provided the response below.

Because section 6652(j) is not worded in a way that suggests the possibility of accrual of the penalty for each day that the failure to file the certification continues, its imposition is limited to each failure to file a certification rather than each day a person continually fails to file a certification. Section 6652(j) imposes a \$100 penalty for failure to provide required certification "for each such failure." There are at least 25 other instances in the Code where a penalty is imposed "for each such failure" or "for such failure," and there is no indication, including regulatory interpretation or case law, that suggests any of those penalties are increased to include time periods during which a failure persists. For example, section 6723 imposes a penalty of \$50 "for each such failure" to comply with a specified information reporting requirement. Treas. Reg. section 301.6723-1(b), Example 1, describes a situation where the penalty is imposed upon an individual for failing to fulfill two separate information reporting requirements. The individual is penalized once for each of the two failures, for a total penalty of \$100; there is no indication that the penalty continues to accrue until the time that the individual complies with the information reporting requirements. In contrast, penalties that do continue to accrue after an initial failure contain explicit language to that effect. For example, section 6652(c)(1) imposes a \$20 penalty on exempt organizations for failure to file certain returns or statements or failure to include any of the information required to be shown "each day during which such failure continues." If Congress had intended for the section 6652(j) penalty to accrue on a daily basis, the statutory wording would have paralleled the statutory language of other penalties that accrue daily as a failure continues rather than use wording that parallels language in penalties that do not accrue daily. See sections 6652(e), (f), (h), and (i); 6693(c)(2)(A) and (c)(2)(B); 6708(a); 6710(a).

The Joint Committee Print addressing the underlying legislation, "General Explanation of the Tax Reform Act of 1986," JCS-10-87, does state that a separate failure to comply occurs each day after the due date that a report is not filed. The Explanation was released on May 4, 1987, while the Tax Reform Act was enacted on October 22, 1986. Courts have held that Joint Committee Explanations, when prepared after the enactment of the statute, do not rise to level of legislative history but are nonetheless entitled to great respect. See Redlark v. Commissioner, 141 F.3d 936 (9th Cir. 1998), Miller v. U.S., 65 F.3d 687, 690 (8th Cir. 1995), McDonald v. Commissioner, 764 F.2d 322, 336 n. 25 (5th Cir. 1985). The Explanations "are at least instructive as to the reasonableness of an agency's interpretation of a facially ambiguous statute. Redlark at 941.

As explained above, section 6652(j) is not ambiguous. As a result, it is not necessary or appropriate to consider its legislative history or other extrinsic evidence of congressional intent. Honeywell Intern, Inc. v. U.S., 64 Fed. Cl. 188, 199 (2005), Sherwin-Williams Co. v. U.S., 403 F.3d 793, 797 (6th Cir. 2005), U.S. v. BDO Seidman, LLP, 492 F.3d 806, 823 (7th Cir. 2007). The statute clearly imposes a penalty for each time a required certification is not filed and does not impose a penalty with respect to a particular certification beyond the initial failure to file.